

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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4 In the Matter of:

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6 SECURITIES INVESTOR PROTECTION CORP, Adv. No. 08-01789 (SMB)

7 Plaintiff,

8 v.

9 BERNARD L. MADOFF INVESTMENT SEC.,

10 Defendant.

11 - - - - - x

12 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION

13 OF B, Adv. No. 10-04215 (SMB)

14 Plaintiff,

15 v.

16 BONGIORNO, ET AL.,

17 Defendants.

18 - - - - - x

19 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION

20 OF B, Adv. No. 10-04538 (SMB)

21 Plaintiff,

22 v.

23 JAMES B. PINTO REVOCABLE TRUST,

24 Defendant.

25 - - - - - x

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U.S. Bankruptcy Court
One Bowling Green
New York, NY 10004

September 28, 2016
10:02 AM

B E F O R E :

HON STUART M. BERNSTEIN

U.S. BANKRUPTCY JUDGE

1 Hearing re: Discover conference re motions to compel of
2 defendants represented by Chaitman LLP

3

4 Hearing re: Motion to affirm trustee's determination
5 denying claims of claimants holding interests in Chalek
6 Associates LLC, Chaitman/Schwebel LLC, FGLS Equity LLC,
7 Larsco Investments LLC and Kuntzman Family LLC

8

9 Hearing re: Motion to approve settlement among trustee,
10 Annette Bongiorno, and Rudy Bongiorno pursuant to Federal
11 Bankruptcy Rule 9019

12

13 Hearing re: conference re discovery

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25 Transcribed by: Jamie Gallagher

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1 P R O C E E D I N G S

2 THE COURT: Madoff, why don't we do the conference
3 with Ms. Chaitman first.

4 MS. CHAITMAN: Good morning.

5 THE COURT: Good morning.

6 MS. CHAITMAN: Helen Davis Chaitman of Chaitman
7 LLP on behalf of the moving parties (indiscernible).

8 THE COURT: Won't you keep your voice up, please.
9 Speak into the microphone. Go ahead.

10 MR. JACOBS: Your Honor, it's Edward Jacobs on
11 behalf of the trustee.

12 MS. CARLISLE: And Marie Carlisle, also on behalf
13 of the trustee.

14 THE COURT: Thank you. Go ahead, Ms. Chaitman.

15 MS. CHAITMAN: Your Honor, we filed voluminous
16 papers in two cases. One in Willenitz (ph), where the Court
17 had given us permission to file a motion. And we filed the
18 motion in one other case, but we didn't have permission from
19 Your Honor to file. What we had hoped to do was file
20 motions in all of the cases that we're handling because the
21 same discovery demands have been served in all cases and
22 we'd like to establish a mechanism where if you enter an
23 order, it would be applicable in all cases rather than
24 burdening the Court with, you know, 90 different motions.
25 They're all the same issues. I simply would like whatever

1 the Court's ruling is to apply to all of the cases and I can
2 provide that exhibit with a list.

3 MR. JACOBS: Your Honor, there's quite a few
4 considerations here if you'll be patient with me this
5 morning and I'll apologize in advance. It's a little bit
6 tedious, but I think it's important for the Court to be
7 reminded of the background and context here.

8 Back in April, we originally asked the Court for a
9 protective order on this discovery as it was served in the
10 Willenitz matter on the basis that is completely frivolous
11 and objectionable pursuant to all of the well-established
12 Rules of Civil Procedure and case law. We had a hearing on
13 May 17th. We had nearly two hours of argument where the
14 Court examined, with both parties present, each and every
15 single request. There were 19 of them. And the Court found
16 without exception that every single one of our objections to
17 those requests were substantiated.

18 THE COURT: Well, that's not quite what happened,
19 but go ahead.

20 MR. JACOBS: Forgive me if I've misstated any --
21 it was not my intention to misstate anything that the Court
22 had --

23 THE COURT: Okay. Because I read the transcript
24 again yesterday. Go ahead.

25 MR. JACOBS: And I agree with Ms. Chaitman that,

1 Your Honor, you did say repeatedly throughout that hearing
2 that she could file a motion to compel. And we had a
3 colloquy at the end about how we had preferred to move for a
4 protective order, and you had something to the effect that
5 you would hope that Ms. Chaitman would reconsider.

6 The reason why I'm raising this background is
7 because I think we've seen a pattern here where Ms. Chaitman
8 brings a frivolous discovery dispute in a case. We have a
9 hearing. The Court's guidance is unfavorable to her. So
10 she then turns around and litigates those same issues in
11 other cases. And that, Your Honor, respectfully, is
12 prejudicial to the trustee. So --

13 THE COURT: Let me ask you a practical question.

14 MR. JACOBS: Yes.

15 THE COURT: I told her she could go ahead and make
16 a motion to compel.

17 MR. JACOBS: Right.

18 THE COURT: And all the discovery issue -- all the
19 interrogatories, at least, are the same.

20 MR. JACOBS: Right.

21 THE COURT: Does it make sense for her to file --
22 have a conference which would be a waste of time because
23 we've had that conference already.

24 MR. JACOBS: Right.

25 THE COURT: Does it make sense to file a motion in

1 every single case, or should we just deal with the one
2 motion and make it applicable for all the cases?

3 MR. JACOBS: Your Honor, first just one fact
4 that's important that they're -- the discovery requests are
5 not identical. There were two different requests that were
6 served --

7 THE COURT: Okay. Fair enough.

8 MR. JACOBS: Substantially they are identical,
9 you're right. And I agree that as a practical matter,
10 there's this discovery that Ms. Chaitman has served on the
11 trustee. Our answers are likely going to be the same in all
12 of her cases across all of our cases beyond Ms. Chaitman's.
13 And for practical reasons, as I've said to her and to the
14 Court, we would be happy on a dispute by dispute basis to
15 enter into a stipulation as to the applicability of Your
16 Honor's ruling and willingness, for example, to all other
17 cases.

18 The problem with doing that as a blanket rule is
19 that with respect to discovery, and Your Honor, you have
20 some letters pending from us about Ms. Chaitman's discovery
21 responses, all of the discovery issues with respect to the
22 defendants' discovery is not the same. And it is very
23 different. And some defendants pay taxes and some --

24 THE COURT: Well, let's get back to this, okay?

25 MR. JACOBS: Okay.

1 THE COURT: This is her discovery. So how do you
2 propose it be dealt with?

3 MR. JACOBS: I'd propose, Your Honor, that --
4 well, in the first instance, our view is that additional
5 briefing is a waste of our time and the Court's time because
6 the discovery is frivolous and doesn't warrant any further
7 attention.

8 THE COURT: I disagree and I'll tell you why. A
9 lot of your objections are premised on the argument that
10 this information has been made available or produced. And I
11 told you at least three times at the last hearing that
12 you're going to have to convince me of that. Your just
13 telling me that --

14 MR. JACOBS: Right.

15 THE COURT: -- doesn't do it. So you're going to
16 have to submit affidavits or whatever which explain how your
17 data room works and how this information has been produced.

18 MR. JACOBS: We will be happy to do that.

19 THE COURT: All right.

20 MR. JACOBS: So knowing your position, Your
21 Honor --

22 THE COURT: I've said it several times the last
23 time.

24 MR. JACOBS: I understand, Your Honor, and until
25 now we haven't had an opportunity to do that, but we've been

1 preparing those materials for your consideration.

2 THE COURT: In terms of the best way to do it, my
3 own view is it's easier to deal with one motion than to deal
4 with 89 motions when they're all the same. Now, the only
5 thing I would say is I'd look back over the interrogatories,
6 and some of them may be case specific. For example, you
7 have questions in there about PW. And some defendants might
8 not have any PW entries or the transfer account might not
9 have any PW entries. And as to those cases, it's
10 irrelevant. But there's only one or two interrogatories
11 like that. Most of them are just the same in every case.

12 MS. CHAITMAN: And if I may, Your Honor, even with
13 respect to that. One of the central issues that the Court
14 will have to face in all of these cases is whether the
15 Madoff business records are admissible under the exception
16 to the hearsay rule. They have to --

17 THE COURT: I'm not going to decide that in the
18 context of this Court.

19 MS. CHAITMAN: No, no, no. But what I'm saying is
20 for the purposes of discovery, we would like to have every
21 defendant, even if the defendant was not charged with profit
22 withdrawals. To the extent that Madoff's records show
23 profit withdrawals that the Court ultimately finds did not
24 occur, that goes to the reliability of the records. So I --

25 THE COURT: Look. Okay, but I said to you the

1 last time that the issue is whether the records in the
2 particular adversary proceeding accurately reflects the
3 transactions as to that defendant or defendants. If the
4 records -- I'm not going to try kind of a pattern and
5 practice case of inaccurate or mistaken records. You have
6 to -- the issue is whether they correctly depict the
7 transactions of the case I'm trying.

8 So if there were mistakes in other cases, and I
9 saw those interrogatories, and I'm probably going to grant a
10 protective order or not grant the motion to compel as to
11 those types of interrogatories, I just don't see that as
12 relevant.

13 MS. CHAITMAN: You know, I don't want to take your
14 time up talking. The merits have it.

15 THE COURT: Why don't we do this? Let's deal with
16 the Willenitz motion. Whether or not you stipulate, I'm
17 going to reach the same conclusion in every single case. So
18 if you want to make the determination applicable by
19 stipulation, which I've heard discovery in those cases,
20 that's fine. But I just think that makes more sense than
21 having to read through 89 -- what, did you file one master
22 brief?

23 MS. CHAITMAN: The interrogatories are -- in --

24 THE COURT: I know, but how many briefs -- how
25 many briefs do we have to read? How many motions do we have

1 to read?

2 MS. CHAITMAN: I'd like it to be one motion and
3 one brief because it's the identical issue for everybody.

4 THE COURT: Did you file 89 motions? That's all
5 I'm asking.

6 MS. CHAITMAN: I did not --

7 THE COURT: All right. That doesn't seem to make
8 a lot of sense.

9 MR. JACOBS: I agree, Your Honor.

10 THE COURT: It's a waste of time and paper. Why
11 don't we deal with the Willenitz motion? I know you made
12 the motion in Gordon also, but let's deal with the Willenitz
13 motion. I'm probably going to reach the same conclusion in
14 every single matter and just think that, you know, even if
15 you don't stipulate, that's going to be the result.

16 MR. JACOBS: I understand, Your Honor. I thank
17 you.

18 THE COURT: All right. But as I said, and I
19 admonished you last time, you're going to have to convince
20 me that this material was either made available to her
21 already or that she can figure out the answers -- go to the
22 same trouble that you would have to go through to figure
23 out --

24 MR. JACOBS: Right.

25 THE COURT: -- the answers with the material in

1 there. And, you know, if that's the case, you'll have to go
2 to our data room and figure it out.

3 MR. JACOBS: Your Honor --

4 THE COURT: I don't want to do it, but if it's
5 just as difficult for them as for you.

6 MR. JACOBS: We're happy, Your Honor, to provide
7 you with that information. And also, just for the Court's
8 reference, we did produce Bruce Davinski's (ph) report in
9 this case just this week. So and Ms. Chaitman has that, as
10 well, which we will discuss in our brief.

11 THE COURT: Is it the same report in every case or
12 is it case specific or adversary proceeding specific --

13 MR. JACOBS: This is the proof of prog report that
14 is at this point, I guess, the same in every case, Your
15 Honor.

16 THE COURT: And maybe this is a good time, even
17 though it's not really an omnibus procedure, to deal with
18 that insolvency issue that I raised the last time. I just
19 don't think it's relevant --

20 MR. JACOBS: Okay.

21 THE COURT: -- at all.

22 MR. JACOBS: Okay, but we will talk internally
23 about that and get back to the report if that's okay.

24 THE COURT: Okay. If you want to interject it in
25 the case, I mean, I guess you can, but I just don't see how

1 it's relevant in an intentional fraudulent transfer case.

2 MR. JACOBS: Okay.

3 MS. CHAITMAN: May I just ask you, Judge, on that
4 issue, I know you said that the last time we were here on
5 this. Are you saying that because the fraudulent transfer
6 actions are under 548(a)(1)(A) and that's not -- there's no
7 insolvency requirements?

8 THE COURT: Well, it's an intentional fraudulent
9 transfer. There's no insolvency requirement.

10 MS. CHAITMAN: And that's the basis on which
11 you're --

12 THE COURT: Yes.

13 MS. CHAITMAN: Okay. And what I'm --

14 THE COURT: That's my understanding of the law.

15 MS. CHAITMAN: No, I completely understand that,
16 but what I had said last time and I'd just like to clarify
17 so I understand your view on it, I had said that we still
18 had the issue of whether Madoff's operation as a whole was a
19 Ponzi scheme, if this was only a small percentage of it --
20 of the activity and --

21 THE COURT: I thought that we were setting up some
22 sort of omnibus procedure to decide that because that's --
23 although you may have the majority of the cases, that's an
24 issue that's in every case. I would just separate out the
25 issue of when Madoff Ponzi schemed again or whether he was

1 operating a Ponzi scheme, and whether it's an -- you know,
2 they're insolvent in a particular adversary proceeding
3 because of that particular adversary proceeding I don't see
4 how it's relevant.

5 Have you done anything about this omnibus
6 procedure for, you know, whether this is a Ponzi scheme?

7 MR. JACOBS: Well, we've discussed it, Your Honor.
8 We -- obviously, we haven't made any formal presentation to
9 the Court or to our defendants.

10 THE COURT: All right. It's the same issue in
11 every plain determination and in every adversary proceeding.

12 MR. JACOBS: Okay.

13 THE COURT: All right?

14 MR. JACOBS: Thank you.

15 THE COURT: I mean, I guess the same is true with
16 PW in this specific case. It's being dealt with separately.
17 And there's no point -- the whole point of these omnibus
18 procedures is not to interject it separately in every case.

19 MS. CHAITMAN: Right. So you're suggesting that
20 we figure out what the issues are that are common to each of
21 the cases and then we discuss --

22 THE COURT: Well, we've dealt with a lot of them
23 already.

24 MS. CHAITMAN: Right.

25 THE COURT: Obviously when the Ponzi scheme began

1 or if there was a Ponzi scheme is an issue that's common to
2 every case and every claim determination too.

3 MS. CHAITMAN: And another one is, as I mentioned,
4 Your Honor, the last time I was here, Mr. Madoff's testimony
5 that purchase meant sale and sale meant purchase because it
6 was -- what he was reflecting on the statements was that
7 Madoff's operation was selling to the customer. So on the
8 customer statement it says sell 100 shares of IBM, but
9 that's actually -- what Madoff says is that's actually the
10 entity selling to the customer.

11 THE COURT: So what?

12 MS. CHAITMAN: So it's backwards of what it
13 appears to be.

14 THE COURT: But it -- all right.

15 MS. CHAITMAN: I mean that goes to, for example --

16 THE COURT: But dealing with actual cash
17 withdrawals and when a statement says cash withdrawal, it's
18 not really a deposit, is it?

19 MS. CHAITMAN: Okay, it actually goes to when the
20 fraud began because Mr. Davinski's expert report didn't take
21 into consideration Madoff's testimony as to what those
22 meant. So in other words --

23 THE COURT: Maybe it's not confirmed by the books
24 and records that --

25 MS. CHAITMAN: No, what Mr. Davinski's expert

1 report says, for example, is that certain transactions
2 couldn't have happened because the total transactions which
3 were shown, like the total sales of a certain stock exceeded
4 what was sold on that day in the market. But if, in fact,
5 they were sold from inventory that Madoff had, then that
6 would have been an incorrect criteria. So --

7 THE COURT: Did Madoff actually buy and sell
8 stocks in any of his businesses?

9 MS. CHAITMAN: Huge. He was the biggest trader --

10 THE COURT: Well, let me -- okay. I know what --
11 he was the biggest trader up until 2008, but he wasn't
12 buying and selling stocks.

13 MR. JACOBS: Your Honor, that's a complicated
14 answer that -- to which I don't want to make a
15 representation on the record outside of a formal proceeding
16 where we have our --

17 THE COURT: All right, I didn't realize that --
18 okay, so it sounds like he was buying and selling stocks,
19 but --

20 MS. CHAITMAN: Judge, the evidence will show that
21 for the last 25 years of his operation, even up until the
22 end, he was a legitimate trader doing business with Bear
23 Stearn, Schwab, Fidelity, all of the major financial firms.
24 And he did trades equal to 10 percent of the daily volume on
25 the New York Stock Exchange. This was bigger than Goldman

1 Sachs, bigger than Merrill Lynch, bigger than Schwab, bigger
2 than Fidelity. This was real trading. He had 140 people
3 who were legitimately trading.

4 So what he was testifying was that he was selling
5 his own inventory to the IA customers and then buying it
6 back from them. So what I'm saying is that --

7 THE COURT: Well, those are actual transactions
8 that -- or they would be actual transactions if that's what
9 occurred.

10 MS. CHAITMAN: Right, but the point is --

11 MR. JACOBS: Your Honor, that's not supported
12 either by his testimony or the evidence and I don't see the
13 point of having this discussion today.

14 THE COURT: Okay. I really -- look, we've dealt
15 with the discovery conference. It's a very interesting
16 issue, when it began, whether he had a Ponzi scheme. All
17 I'm saying is it's an omnibus issue. It affects every case
18 and claim determination. So let's deal with it as an
19 omnibus issue.

20 MS. CHAITMAN: I think that makes a lot of sense.

21 THE COURT: All right.

22 MS. CHAITMAN: Okay, thank you.

23 MR. JACOBS: Thank you, Your Honor.

24 THE COURT: All right, so you'll just deal with
25 Willenitz.

1 MS. CHAITMAN: Why don't -- if you don't mind, I'd
2 like to deal with the other case because I -- you prohibited
3 me from asking certain interrogatories about --

4 THE COURT: Right.

5 MS. CHAITMAN: So the other case doesn't have
6 those interrogatories. It's the same as --

7 THE COURT: Those two extra interrogatories?

8 MS. CHAITMAN: The ones about the trustee's
9 compensation. So those are not --

10 THE COURT: Well, I'm not -- that's been
11 addressed, right.

12 MS. CHAITMAN: That's been addressed, exactly.
13 But -- well, we can use either one. I mean --

14 MR. JACOBS: Can we please proceed in Willenitz,
15 the other two cases don't -- weren't authorized.

16 THE COURT: Let's just do the one unless you're
17 telling me that --

18 MS. CHAITMAN: Fine. No, that -- it --

19 THE COURT: You're telling me they're all the
20 same, so let's --

21 MS. CHAITMAN: Except that they have those
22 additional ones that you broke on. The ones relating to the
23 question --

24 THE COURT: All right, fine. Let's just -- okay,
25 I told you you could make the motion. So the fact that I

1 told you where I'd go ahead and come out doesn't affect --

2 MS. CHAITMAN: Yeah.

3 THE COURT: -- anything in the motion. We'll deal
4 with Willenitz. Whatever is decided in Willenitz, unless
5 there is something I'm missing, will apply in every case
6 anyway, whether or not you agree to it. Okay?

7 MS. CHAITMAN: Great.

8 THE COURT: Great.

9 MS. CHAITMAN: Thank you, Judge.

10 THE COURT: So do you have a schedule for dealing
11 with Willenitz if we file the responses?

12 MR. JACOBS: Thank you, Your Honor, for reminding
13 me of that. Could we have -- Ms. Chaitman has filed her
14 motion. It's pending, so could we have two weeks to file
15 our response?

16 THE COURT: Two weeks from today?

17 MR. JACOBS: That would be more than sufficient,
18 yes.

19 THE COURT: So what's two weeks from today? There
20 are holidays coming up the next couple of weeks.

21 MR. JACOBS: That's correct. It probably would be
22 prudent to look at a calendar.

23 THE COURT: Well, two weeks from Friday is October
24 7th, but that -- I'm sorry, it's October 14th. There are a
25 lot of Jewish holidays in that --

1 MS. CHAITMAN: And then I would like a reply.

2 THE COURT: Okay. Let's fix the answering date
3 first. When can you file the answer?

4 MR. JACOBS: I respectfully request a minimum of
5 two weeks. So if the Court would prefer --

6 THE COURT: How about Friday, October 14th?
7 That's 16 days. That's --

8 MR. JACOBS: That would --

9 THE COURT: -- more than two weeks.

10 MR. JACOBS: That's more than sufficient. Thank
11 you, Your Honor.

12 THE COURT: Okay. And how long do you need for a
13 reply, Ms. Chaitman?

14 MS. CHAITMAN: Until the 21st, is that all right?

15 THE COURT: Okay. Reply the 21st. When I read
16 the papers, I'll decide if I need any more argument on it.

17 MR. JACOBS: Okay.

18 THE COURT: We've been through it once before.

19 MS. CHAITMAN: Okay.

20 THE COURT: All right?

21 MS. CHAITMAN: Thank you, Judge.

22 THE COURT: So just pick a submission date after
23 October 21st so it will be deemed -- or I guess it can be
24 deemed submitted when the reply was filed.

25 MR. JACOBS: Okay.

1 THE COURT: And then I'll fix an argument date if
2 I need one.

3 Next I have the claim -- the trustee's --
4 affirming the trustee's determination.

5 MS. ACKERMAN: Good morning, Your Honor.
6 Stephanie Ackerman of Baker & Hostetler on behalf of Irving
7 Picard, the trustee, for the Madoff matter.

8 We're here today on the trustee's motion to affirm
9 the determination of 22 claims which were filed by claimants
10 who invested in one of five limited liability companies:
11 Chalek Associates LLC, Chaitman/Schwebel LLC, FGLS Equity
12 LLC, Larsco Investments LLC, and Kuntzman Family LLC.

13 The objecting claimants invested money in one of
14 the limited liability companies, which in turn invested with
15 BLMIS. The objecting claimants had no financial
16 relationship with BLMIS and did not own the assets entrusted
17 to BLMIS for the purposes of trading securities.

18 Thus, denial of these claims is consistent with
19 the 14 prior decisions in this liquidation and the Second
20 Circuit's decisions in Cruz (ph) and Morgan Kennedy. The
21 claimants like those in the prior motions before this Court
22 are no customers because in addition to not owning the
23 assets invested with BLMIS, they had no control over the
24 funds invested and were unknown to BLMIS.

25 No objections to the relief requested by the

1 trustee have been filed. And so subject to any questions,
2 we respectfully request that the motion be granted.

3 THE COURT: Does anyone want to be heard in
4 connection with this motion? The record should reflect
5 there's no response. The motion is granted. The claimants
6 were investors and customers of BLMIS. They weren't
7 customers of BLMIS and they have no customer claims. You
8 can submit an order.

9 MS. ACKERMAN: Thank you, Your Honor.

10 THE COURT: Next I have the settlement with
11 Bongiorno.

12 MR. BOHORQUEZ: Good morning, Your Honor.

13 THE COURT: Good morning.

14 MR. BOHORQUEZ: Fernando Bohorquez, Baker
15 Hostetler, counsel for the trustee. We're here this morning
16 on the trustee's application under Bankruptcy Rule 9019,
17 seeking approval of the settlement agreement between the
18 trustee, Rudy, and Annette Bongiorno. This settlement is
19 part of a global settlement between the trustee, the
20 Bongornos, and the United States Attorney's Office in an
21 effort to resolve the Government's remaining claims against
22 Bongornos' assets and are what is actions against the
23 Bongornos.

24 As I'll discuss in detail the two principal terms
25 of the settlement by way of the trustee are: one, a transfer

1 of approximately \$3.9 million from Rudy Bongiorno's E-trade
2 accounts to the trustee; and two, Annette Bongiorno's
3 unfettered cooperation with the trustee in SIPC's continued
4 investigation of the Madoff fraud.

5 As Your Honor is aware, Mr. Bongiorno was one of
6 the so-called Madoff Five that were tried and convicted in
7 the criminal trial in June of 2014. Part of that sentence,
8 Judge Swain not only sentenced her to jail time but also
9 entered a money judgment forfeiture order of approximately
10 \$155 million.

11 THE COURT: Did the defendants have any assets
12 that weren't forfeited?

13 MR. BOHORQUEZ: Pardon?

14 THE COURT: Do the defendants have any assets that
15 weren't forfeited?

16 MR. BOHORQUEZ: All of Annette Bongiorno's assets
17 were forfeited. Rudy Bongiorno still holds onto certain
18 accounts in his E-trade account and other bank accounts.

19 Part of the deal with the U.S. Attorney's Office
20 was the U.S. Attorney was able to trace significant amounts
21 of money from BLMIS to Rudy Bongiorno. And through several
22 months of negotiation between ourselves, the U.S. Attorney,
23 and the two counsel for the Bongornos, we were able to
24 reach this settlement of taking some portion of the E-trade
25 account that was being forfeited from Rudy Bongiorno and

1 handing that to the trustee.

2 THE COURT: What I'm asking is, it really goes to
3 collectability of any judgment because without this deal,
4 all of the assets are forfeited and whatever property of
5 these particular defendants, do they have anything --
6 Ms. Bongiorno, has no unforfeited assets at this point?

7 MR. BOHORQUEZ: Pardon?

8 THE COURT: Ms. Bongiorno has no unforfeited
9 assets.

10 MR. BOHORQUEZ: Zero.

11 THE COURT: There was not language to acquire it.

12 MR. BOHORQUEZ: Correct.

13 THE COURT: What about Mr. Bongiorno?

14 MR. BOHORQUEZ: He still has assets in the form of
15 certain bank accounts and recoverable retained stocks in E-
16 trade and I believe his SunTrust account. But the majority
17 of those assets were forfeited to the U.S. Attorney's
18 assets.

19 THE COURT: But he has assets that were never
20 forfeited, right?

21 MR. BOHORQUEZ: Yes.

22 THE COURT: So you could get a judgment against
23 him and enforce it, right?

24 MR. BOHORQUEZ: We could. We could. But part of
25 the calculation, Your Honor, is we have -- we are -- our

1 rights are secondary to the U.S. Attorney's Office. We saw
2 the opportunity here to work with the U.S. Attorney's
3 Office, secure close to \$4 million, avoid the cost of
4 litigation, and in the meanwhile have Annette Bongiorno's
5 cooperation in our various pending litigations.

6 As Your Honor has seen, she's already provided
7 helpful information in profit withdrawal action and we
8 anticipate --

9 THE COURT: I'm told.

10 MR. BOHORQUEZ: Well, you'll see -- you will see
11 when the motion -- when the matter is properly briefed. But
12 we anticipate that given her experience and longevity at
13 BLMIS, she's going to provide very valuable, informative
14 information to our other matters.

15 THE COURT: Okay. Great. Does anyone else want
16 to be heard in connection with the application?

17 I'll approve the application. To the extent --
18 without this agreement with the U.S. Government, to the
19 extent there's forfeited property, it never became property
20 of the defendants and would not be available even if the
21 trustee got a judgment. It's always worth it for somebody
22 to write a check and not have to litigate. The state will
23 get over \$4 million or maybe more than \$4 million and get
24 Ms. Bongiorno's cooperation. So it certainly is a
25 reasonable settlement. You can submit an order.

1 MR. BOHORQUEZ: Thank you, Your Honor.

2 THE COURT: Next is Pinto.

3 MR. HUNT: Good morning, Your Honor. Dean Hunt
4 for the trustee. I believe defense counsel was going to be
5 appearing by phone today.

6 THE COURT: Okay. Is Mr. Ingber on the phone?

7 MR. INGBER: Yes, Your Honor. I'm appearing on
8 behalf of defendants James Pinto and (indiscernible).

9 THE COURT: Mr. Ingber, if you're on a speaker,
10 would you take it off because it's very hard to hear you and
11 just speak into the receiver.

12 MR. INGBER: No, I'm not on a speaker phone, I'm
13 on a handheld phone.

14 THE COURT: All right. We'll do the best we can.
15 Go ahead.

16 MR. HUNT: Your Honor, this is the third time
17 we've come to the Court on this issue. This is a Rule
18 7071(b) request to file a motion to compel and set that for
19 the October 26th, omnibus proceeding. We'd also like to get
20 the Court's instruction and guidance on the discovery that
21 the defendants need to answer.

22 There are really three issues which have been laid
23 out in great detail in our three separate letters. The
24 first being an issue that has been litigated now for over
25 seven months involving the defendants' unwillingness to

1 answer discovery for the life of the account. They actually
2 -- one of the first times in my career I've actually seen a
3 footnote in a request for admission saying that they're
4 limiting their answers to the last two years of the account
5 and they will not respond --

6 THE COURT: I guess it's an implied relevancy.

7 MR. HUNT: Apparently. But of course, under the
8 net equity calculation, we have a right to discovery on all
9 of those issues. And second is an issue that's been ongoing
10 now for at least three months involving a purported forensic
11 analysis that the defendants have engaged accountants to do.
12 They reported that to us for the first time on June 24th
13 after they had already told us they were going to answer all
14 of the discovery. The accountants have now been working on
15 that for at least three months.

16 In June, they told us that they'd worked nearly
17 all day on these things and they were going to get it to us
18 as quickly as they could. Last week Mr. Ingber advised that
19 they needed another 30 to 45 days for their forensic
20 accountant to do whatever he was or she was doing.

21 THE COURT: Have you asked for any forensic
22 accounting materials?

23 MR. HUNT: No, we just asked for simple
24 interrogatories and for documents. And the documents that
25 apparently the forensic accountants are looking at have not

1 been produced.

2 The third issue is an issue that's been ongoing
3 now for at least five months where we have been advised that
4 there are documents available to be produced, but they have
5 not been produced.

6 In particular, there are documents that are held
7 by the trustee for these trusts of Mr. Sidney Kaplan (ph),
8 who has confirmed that he has fairly voluminous records that
9 are right on point. Most recently we were advised that
10 those could not be produced because there wasn't enough
11 money in opposing counsel's trust account to justify him
12 spending the time to review the documents because he wasn't
13 sure he was going to get paid.

14 Those documents are clearly relevant and we'd ask
15 the Court's guidance to defense counsel to go ahead and get
16 those produced to us.

17 THE COURT: Mr. Ingber?

18 MR. INGBER: Yes, Your Honor.

19 THE COURT: Let's start with the refusal to
20 answer, I guess, say the request for admissions --

21 MR. HUNT: And interrogatories.

22 THE COURT: Or the -- or as to the life of the
23 account.

24 MR. INGBER: By way of background if I could, Your
25 Honor. I am an estate planner not a litigator. Mr. Hunt

1 has been dealing directly with the litigator in this case
2 who has been terminated, Robert McClay (ph).

3 THE COURT: Well, it's still -- he's still counsel
4 of record, isn't he?

5 MR. INGBER: We have terminated him.

6 THE COURT: Well, he's still counsel of record.
7 You didn't terminate -- whether or not you think you
8 terminated him, unless there's a Court order allowing him to
9 withdraw, he's still counsel of record.

10 MR. INGBER: Yes. I understand that, Your Honor.

11 THE COURT: Let's get back to the objection -- the
12 implied objection, I guess, that transactions that occurred
13 more than two years before the filing date are irrelevant.
14 I assume that's the basis for the refusal to answer?

15 MR. INGBER: I really have no idea, Your Honor.

16 THE COURT: All right. Well, let's -- and so the
17 objection is overruled. You have to answer that because
18 it's relevant to a determination of fictitious profits. So
19 even though deposits and withdrawals occurred 50 years
20 before the filing date, they're relevant.

21 MR. INGBER: I understand, Your Honor. I have no
22 idea why Mr. McClay put that answer in that way. He's been
23 dealing with Mr. Hunt and two of his partners in the Houston
24 office. It was Mr. Hunt's letter of September 7th that made
25 the clients and myself aware of the extent of the

1 delinquency of the response to the trustee's discovery
2 request. And we have retained other counsel to replace
3 Mr. McClay. The issue becomes, and I can address the other
4 two issues, the forensic accounting and the Sidney Kaplan
5 issue.

6 Their forensic accounting was a proposal by
7 Mr. McClay that hopefully had shown, as I understand it,
8 that the withdrawals during the last two years, 2006 to
9 2008, were spent on expenses and costs and were not
10 transferred to third parties for lack of full and adequate
11 consideration. The --

12 THE COURT: There are subsequent transfer claims
13 in these cases?

14 MR. HUNT: No, sir.

15 THE COURT: Well, that may be. I understand that
16 but -- and that's an issue maybe for trial, but you still
17 have to produce the materials. The trustee doesn't have to
18 wait until you complete your forensic accounting and prepare
19 your defense. He's got his own case to --

20 MR. INGBER: No, that I understand now. What we
21 have received -- I talked -- when we terminated Mr. McClay,
22 even though I know officially not relieved of Court, I
23 started talking with the accountants. And they told me they
24 had gotten some materials from the defendants, but going
25 back 6 to 8 years, 8 to 10 years, they have gotten very

1 little from them. So they are unable -- they need actual
2 cancelled checks. What they did receive were bank
3 statements, savings account statements, checking account
4 statements, but no indication of the underlying cancelled
5 checks or the credit card (indiscernible).

6 So they're not going to be able to render an
7 opinion or render any kind of forensic accounting report as
8 I understand it, that there are no -- or there were no
9 subsequent transfers. So they're not going to -- they can't
10 do anything.

11 THE COURT: That's not an issue for discovery.
12 You have the information and documents that were requested.
13 You haven't explained to me why they're not being produced.
14 So isn't it appropriate simply to enter an order that they
15 have to be produced by a specific deadline?

16 MR. INGBER: That's fine, Your Honor.

17 THE COURT: Okay. When are you going to produce
18 them?

19 MR. INGBER: I need to retain the replacement
20 counsel.

21 THE COURT: I'm not -- no, they're still. No, no,
22 no. This has been going on a long time and the trustee
23 doesn't have to be (indiscernible) in a dispute between the
24 client and former counsel or counsel of record. So what I'm
25 going to do is I'll give you 30 days, until the end of

1 October, to produce all the documents and answer the
2 interrogatories to the extent you haven't done so --

3 MR. HUNT: And request for admissions.

4 THE COURT: And request for admissions. That's
5 (indiscernible), the request for admissions. Failing which,
6 the trustee is going to move to strike your answer and enter
7 a judgment and that may be how this -- you know, this ends
8 unless you do what you're required to do. Do you understand
9 that?

10 MR. INGBER: It will put an undue time imposition
11 upon whoever replacement counsel is. I do have replacement
12 counsel. He's got to become familiar with the case.
13 Ultimately, I believe, Your Honor, where defendants are
14 unable to make any payments. So the question is do we use
15 fees that would be paid to retain counsel to put in answers
16 or use that money to end up making a settlement with the
17 defendant -- with the trustee.

18 THE COURT: You know, he's talked about settlement
19 with the trustee. I know the trustee -- if you can convince
20 the trustee that they have no money and no judgment would be
21 collectable, it's more likely than not that it might be
22 settled if you could find the appropriate price. But this
23 is a discovery dispute. I'm going to direct you to turn
24 over the documents and answer the request for admissions by,
25 let's say, October 30 -- October 28th, which is a Friday and

1 you can submit an order.

2 MR. HUNT: So just to be clear on the order, it
3 would be for both the interrogatories and request for
4 admissions would deal with that. Yes, sir.

5 THE COURT: All discovery. This has been
6 outstanding for months. And as far as I'm concerned, if you
7 don't have the information to give to your forensic
8 accountant, that's immaterial to the trustee's requests.

9 MR. HUNT: Thank you, Your Honor. Appreciate your
10 time.

11 MR. INGBER: Understood, Your Honor.

12 THE COURT: All right. And you might tell
13 Mr. McClay that he's still in the case.

14 MR. INGBER: I will remind him of the case, of the
15 fact.

16 THE COURT: All right.

17 MR. INGBER: It's not going to do me much good
18 reminding him, though. Thank you, Your Honor.

19 THE COURT: Okay.

20 MR. INGBER: Mr. Hunt, I'll talk to you when you
21 get back to Houston.

22 MR. HUNT: Thank you.

23 THE COURT: Okay, thank you.

24 MR. INGBER: Okay, thanks. Bye bye.

25 THE COURT: I have nothing else. Is that right?

1 UNIDENTIFIED SPEAKER: I think that's correct,
2 Your Honor.

3 THE COURT: Okay, thank you.

4 (Chorus of thank you)

5 (Whereupon these proceedings were concluded at 10:37
6 AM)

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C E R T I F I C A T I O N

I, Jamie Gallagher, certify that the foregoing transcript is
a true and accurate record of the proceedings.

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